

*Van Schaik*



**Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Xerox Corporation

**File:** B-241554

**Date:** February 14, 1991

James J. Regan, Esq., Crowell & Moring, for the protester.  
Dennis A. Adleson, Esq., Schnader, Harrison, Segal & Lewis,  
for Savin Corp., the interested party.  
Leigh Ann Holt, Esq., and Stuart Young, Esq., General Services  
Administration, for the agency.  
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### **DIGEST**

1. Although contracting agency failed to hold meaningful discussions before rejecting proposed copy machine because of concerns about reliability, the protest is denied since the protester was ultimately given an opportunity, but failed, to respond to the agency's concerns about the reliability of its copy machine.

2. Contracting agency reasonably rejected protester's proposal of copy machine because, based on manufacturer recommended monthly copy volume listed in independent trade publications and the fact that very few of the copiers proposed are in use in the commercial market at the required monthly volume, agency officials had substantial doubts as to the ability of the proposed copiers to reliably produce 20,000 copies per month as required by the solicitation.

### **DECISION**

Xerox Corporation protests the rejection of its proposal under request for proposals (RFP) No. FCGE-90-0015-N issued by the General Services Administration (GSA) for copy machines which are to be used on surface and subsurface Navy and Military Sealift Command vessels. GSA rejected Xerox' offer to supply its Model No. 5018 copier because, in the agency's view, that machine does not meet the solicitation requirement that it be capable of reliably producing 20,000 copies per month.

We deny the protest.

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## BACKGROUND

The solicitation sought proposals for the purchase and lease of five categories or classes of copiers, training, service, parts and supplies for a base year and 4-option years. The solicitation included numerous technical requirements, such as copier speed and dimensions, and for each requirement, the solicitation set forth the "compliance criteria" or method by which the requirement was to be demonstrated. The four compliance criteria were: Criterion A, certification by the offeror that the proposed copier meets the requirement; Criterion B, government benchmark examination; Criterion C, offeror conducted tests prior to submission of proposal and Criterion D, certification plus government testing.

Only Class II, low volume copiers, are at issue in this protest. Among other requirements, proposed Class II copiers were to be "capable of reliably producing at least 20,000 copies per month," with compliance to be determined by Criterion A, certification by the offeror.

The solicitation contemplated award on a class-by-class basis to the responsible offeror or offerors whose proposals were most advantageous to the government. The RFP also stated that the government was to make a determination of the technical acceptability of each proposal based on the technical factors listed in section C, referring to the technical requirements, such as copier speed, dimensions and reliability. According to the RFP, technical acceptability was to be determined using the technical proposals and the evaluation factors in the solicitation and an "operational capability demonstration" or benchmark test that was to be performed on proposed copiers to determine compliance with some of the solicitation's operating requirements.

GSA received only two proposals to supply Class II copiers, from Xerox and Savin Corporation. Xerox offered its Model 5018 copier and included the required certification that Model 5018 is "capable of reliably producing at least 20,000 copies per month." GSA evaluated the proposals, conducted oral and written discussions regarding technical issues with the offerors and gave them a number of opportunities to respond to the technical issues raised in discussions. On the benchmark test of Xerox' Model 5018, the Xerox copier encountered performance problems although it passed the test by demonstrating all the performance requirements in the solicitation under compliance Criterion B.

On September 17, the contracting officer met with Xerox representatives to discuss price issues. During that meeting, according to the contracting officer's notes, she raised with Xerox the agency's concern that various trade publications indicate that Xerox recommends a copy volume of only 3,000 to 6,000 copies per month for the Model 5018. The contracting officer showed the Xerox representatives a copy of the "North American Copier Guide," which recommended usage of the Model 5018 for only 3,000 to 6,000 copies per month and stated "Machine performance is satisfactory if users do not exceed these volumes. Use below the minimum may result in excess capital costs, use above the maximum may result in excess service time." The publication also stated that its principal source of information is manufacturers' specifications and literature and that draft product listings are normally sent to manufacturers for review prior to publication.

According to her notes of the September 17 meeting, the contracting officer was concerned about the capability of the Model 5018 to reliably produce 20,000 copies per month and she informed Xerox that if it could offer a significantly better warranty she "would talk with Navy." She requested that Xerox provide an unconditional free full replacement warranty for any copier that failed to perform for 240,000 copies or 12 months, whichever occurred last.

Although Xerox' representatives who attended the September 17 meeting partially dispute the contracting officer's recollection of that meeting, they confirm that they were shown the "North American Copier Guide" and that the contracting officer requested a better warranty for the Model 5018. Further, although the Xerox employees maintain that the contracting officer did not say that the Model 5018 did not meet the 20,000 copy per month reliability requirement, in an affidavit one of the Xerox employees states, "What I was really surprised about, however, was that the Government would question the capability of the Model 5018 to produce reliably 20,000 copies per month on the basis of information designed to place this machine in a marketing segment, which information has nothing to do with capability or reliability." (Emphasis in original).

In a letter dated September 19, Xerox responded to the issues raised in the September 17 negotiation session:

"GSA has requested a longer warranty for the Class II product based on the expected copy volume of 20,000 copies per month. Xerox assured GSA of its confidence that the Class II copier offered would produce the 20k volume as specified in the contract. Xerox improves its offer through the

provision of a limited extended warranty for each Class II copier, for 12 months or 240,000 copies whichever comes first . . . ."

Xerox' September 19 letter also stated its understanding that there were "no outstanding technical issues" with respect to its Class II copier.

In a letter dated September 25, GSA rejected Xerox' offer to supply Model 5018 copiers. The letter stated that GSA had determined that Xerox' Model 5018 does not meet the technical requirement of the RFP that "copiers shall be capable of reliably producing at least 20,000 copies per month." The letter also stated that GSA had been unable to verify Xerox' certification using trade publications which include manufacturers' recommended monthly volumes and which indicate that Xerox recommends the Model 5018 copier for only 3,000 to 6,000 copies per month.

On September 28, Xerox requested a meeting with the contracting officer to discuss the rejection. The contracting officer denied that request but granted Xerox an opportunity to submit additional information for the contracting officer and the technical panel to review to determine if the rejection should be reversed.

In a letter dated October 2, Xerox requested that the contracting officer reconsider her decision and included information to demonstrate the capability of the Model 5018 to reliably produce 20,000 copies per month.<sup>1/</sup> The October 2 letter explained that the enclosed information included actual service records on the Model 5018 copier. According to the letter, these records showed that "Xerox has a population of 5018 copiers running at, or in excess of, 20,000 copies per month" and that the number of copies that are made between service calls goes up with increased use of the copy machines. The October 2 letter also said that the enclosed information is a far more reliable source of the Model 5018's ability to meet the RFP requirements than "sales information contained in a trade publication."

The October 2 letter also stated that Xerox' proposal included information "that demonstrates the reliability of the 5018 at the required volume of use set forth in the solicitation."<sup>2/</sup> Finally, according to the October 2 letter, the certification included in Xerox' proposal was accurate and complete and met

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<sup>1/</sup> Xerox considers the information which it submitted to be proprietary. As a result, our discussion of that information will necessarily be limited.

<sup>2/</sup> Again, this information is considered proprietary by Xerox.

the requirements of the RFP and GSA's finding that the Model 5018 was technically unacceptable was unsupported.

GSA explains that the contracting officer and the technical evaluation panel reviewed the additional information submitted by Xerox. The record includes a memorandum to the contracting officer from the chairman of the technical panel which disagrees with Xerox' assertion that the October 2 information demonstrated compliance with the 20,000 copies per month reliability requirement. Essentially, it is argued in the memorandum that the number of Xerox Model 5018 copiers producing at or above 20,000 copies per month was "a negligible percentage upon which no significant conclusions can be drawn from the collected data." Also, the chairman stated that the information which Xerox submitted on October 2 only covered 1 month, which is insufficient to demonstrate the ability of the Model 5018 copier to reliably produce 20,000 copies per month.

Based on this review, the contracting officer concluded that the October 2 information was insufficient to demonstrate that the Model 5018 met the solicitation requirement for capability to reliably produce 20,000 copies per month. By letter dated October 5, GSA informed Xerox that it had reviewed the firm's October 2 letter and that the decision to reject the Model 5018 copier remained unchanged.

Xerox filed its protest with this Office. Subsequently, GSA determined, in accordance with 31 U.S.C. § 3553(c)(2) (1988), that urgent and compelling circumstances significantly affecting the interests of the United States did not permit delaying the award of the contract. GSA awarded the contract for Class II copiers to Savin on November 27.

#### PROTEST ALLEGATIONS

Xerox argues that GSA improperly rejected the proposal before the firm was given the opportunity through meaningful discussions to respond to the alleged technical deficiency. Further, the protester argues that it was not until it received the agency protest report that it clearly understood the agency's basis for rejecting its proposal: that the proposed Xerox copier, in the agency's view, could not reliably produce 20,000 copies per month. Xerox maintains that GSA based its rejection of the copier exclusively on marketing data found in various copier guides, while at the same time illogically misconstruing or ignoring reliability information provided in the proposal and in its post-rejection letter. Thus, Xerox concludes that it was not given the opportunity to respond to GSA's concerns during discussions and, as a result, the agency did not have a proper basis upon which reject the proposal.

## Discussions

The RFP required offerors to certify in their proposals that the copiers offered could reliably produce 20,000 copiers per month. There was no requirement for the submission of backup data or for the copiers to be tested to demonstrate their ability to meet the reliability standard. Xerox states that when GSA used information that it discovered in trade publications that caused it to question the firm's certification, the agency improperly failed to inform Xerox of its concerns and give the firm an opportunity to demonstrate compliance. Xerox notes that GSA did not mention the reliability issue during technical discussions and only raised the matter for the first time at the September 17 price negotiation meeting. During that meeting, according to Xerox, GSA only raised the matter in an effort to obtain a better warranty and did not inform Xerox that its proposal was considered technically unacceptable. Further, according to Xerox, GSA either misunderstood or ignored its October 2 letter submitted after the proposal was rejected and, rather than hold discussions with the firm in order to understand the discrepancies between the evaluation and the October 2 submission, GSA simply notified Xerox that it would not change its decision.

In order for discussions to be meaningful, contracting agencies must furnish information to all offerors in the competitive range as to areas in which their proposals are believed to be deficient so that offerors may have an opportunity to revise their proposals to satisfy the agency's requirements. Federal Acquisition Regulation § 15.610(c); Proprietary Software Sys., B-228395, Feb. 12, 1988, 88-1 CPD ¶ 143. It is not necessary for the agency to furnish information in any particular form or manner, however, provided that it finds some means which reasonably communicates the nature and gravity of its concerns. Mark Dunning Indus., Inc., B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364.

Here, prior to the September 17 price negotiation meeting, GSA did not raise with Xerox the agency's concern that the Model 5018 could not reliably produce 20,000 copies per month. Although at the September 17 meeting, the contracting officer discussed with Xerox her concern about the reliability of the Model 5018, the record shows that this issue was raised primarily in an effort to obtain a better warranty. For instance, the contracting officer's pre-negotiation memorandum, which was prepared prior to the September 17 negotiation session, states that one of her "Negotiation Objectives" was to "try to obtain additional warranty since the copiers' life expectancy is only 11 months." In addition, the contracting officer's notes from the September 17 meeting include as an agenda item: "Discuss Xerox recommended monthly volume of 3,000-6,000 copies per month for the Class II copier. Remove/Improve Warranty." Also, in the context of discussing the recommended monthly volume for the Model 5018, the

contracting officer's notes state: "I suggested that if X [Xerox] could give a significantly better warranty that I would talk with Navy." Finally, Xerox' belief that this was not a matter of technical acceptability is evidenced by its September 19 letter in response to the price negotiation session, which simply offered a better warranty and stated that GSA "confirmed that with respect to [Class II] there are no outstanding technical issues."

GSA argues that Xerox should have known that the issue was a matter of technical acceptability since the contracting officer mentioned the recommended 3,000 to 6,000 copies per month in the "North American Copier Guide" and showed that publication to Xerox' representatives. Also the contracting officer says that, in response to Xerox' question of whether "all tech. was acceptable," she responded that the proposal was accepted, "except for issues raised in this meeting."

The record shows that, whatever her view of the technical acceptability of Xerox' proposal, the contracting officer believed that the matter could be resolved by Xerox providing a better warranty. The record also shows that the contracting officer conveyed that belief to Xerox and that the Xerox representatives thought that the matter could be resolved by a warranty. In our view, the contracting officer, by treating the reliability issue solely in the context of a better warranty, inadvertently misled Xerox into concluding that the agency did not consider the reliability issue as a matter pertaining to the technical acceptability of the proposal. Since Xerox reasonably did not perceive the matter in this context, it was not provided the opportunity to respond to the technical aspects of the deficiency. Under the circumstances, we believe that GSA did not afford Xerox meaningful discussions on this issue prior to rejecting its proposal on September 25. See Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136.

Nonetheless, after GSA rejected the proposal, the basis for rejection was made clear to Xerox and the firm was given another opportunity to convince contracting officials of the reliability of its copier. GSA's September 25 rejection letter informed Xerox that its Model 5018 was unacceptable because agency officials were concerned that the copier was not capable of reliably producing 20,000 copies per month. Thus, contrary to Xerox' contention that it did not understand the reason for rejection until it received GSA's protest report, based on the September 25 rejection letter, we believe that Xerox knew or should have known the reason for the rejection. Xerox responded to the rejection of its offer in an October 2 letter which included service records indicating that a number of Model 5018 copiers had produced 20,000 copies per month over a year in actual service; however, as noted above, Xerox failed to convince GSA of the reliability of its copier. Since the protester was given the opportunity to

respond to the agency's concerns, we do not believe that the defect in the discussions impacted on the actual award selection.

#### Selection Decision

Xerox argues that its proposal was improperly rejected based primarily on extraneous and irrelevant marketing information contained in trade publications. The protester explains that it provided the required certification and states that while the agency was permitted to investigate beyond that certification, the information in the trade publications on which the contracting officer relied related to Xerox' marketing strategy for the Model 5018 copier and not its technical capability. In this respect, Xerox says that although it provides recommended monthly copy volumes to trade publications, the 3,000 to 6,000 copies per month that it recommends for the Model 5018 is provided solely as a guide to commercial users to indicate the monthly copy volume at which that machine's (comparatively slow) speed of 18 copies per minute, productivity and value of are optimized. According to Xerox, most commercial users seeking a copy machine to produce 20,000 copies per month would want a machine with a faster per minute speed and more labor-saving features than the Model 5018. Thus, Xerox argues that the 3,000 to 6,000 copies per month recommendation represents the commercial market niche in which Xerox wanted to sell the Model 5018 copier.

Xerox also argues that GSA ignored the reliability, maintainability and availability (RMA) data included in its proposal and information included in its October 2 letter which directly contradicted the copy volume figures in the trade publications. The RFP required offerors to submit RMA data on each copier proposed. Xerox complied with this requirement by submitting a statement that "[t]he average number of copies between failures for the Xerox 5018 is [ ]" and a chart entitled "5018 RMA INFORMATION FOR 1989 @ 20K COPIES/MONTH," which included monthly figures for "Copiers Between Calls" for all 12 months of 1989.<sup>3/</sup>

Xerox argues that it was unreasonable for GSA to conclude from the RMA data and information included in Xerox' October 2 submission that the Model 5018 cannot reliably produce 20,000 copies per month. In this respect, Xerox argues that GSA's focus on the small number of Model 5018 copiers actually operating at 20,000 copies per month is misplaced because industry-wide there are very few copiers that operate at the

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<sup>3/</sup> Xerox considers its "average number of copies between failures" and the monthly "Copies Between Calls" to be proprietary. These figures, however, are all in excess of 20,000 copies.



(comparatively) slow speed of 18 copies per minute required by the RFP for Class II copiers yet also produce 20,000 copies per month. Xerox maintains, therefore, that the small number of Model 5018 copiers operating at 20,000 copies per month indicated by its RMA data and the information which it submitted on October 2 should not have led GSA to conclude that the Model 5018 cannot reliably produce 20,000 copies per month.

Although Xerox certified in its proposal that its Model 5018 would reliably produce 20,000 copies per month, we think GSA reasonably questioned that certification based on the information in the trade publications. Moreover, based on the recommended monthly volumes in the trade publications and other information provided by Xerox, GSA reasonably rejected the firm's proposal because of the risk that the Model 5018 would not reliably produce the required 20,000 copies per month.

The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them and must bear the burden of any difficulties resulting from a defective evaluation. Accordingly, our Office will question a contracting agency's technical judgment only where we find it to be arbitrary or unreasonable or in violation of procurement statutes or regulations. Litton Sys., Inc.; Varian Assocs., Inc., B-229921 et al., May 10, 1988, 88-1 CPD ¶ 448.

The trade publications on which GSA's concerns were based include: "Copier Specification Guide," Spring 1989, published by Buyers Laboratory, Inc.; "Datapro Office Products Evaluation Service," June, 1989; and the "North American Copier Guide," Spring-Summer, 1990, published by INFO-MARKET, Inc. These publications recommend the Xerox Model 5018 for 3,000 to 6,000 copies per month. The publications generally state that the recommended monthly volumes originated with, or were verified by, the manufacturers.

Xerox does not deny that it in fact provided the information that was included in these publications but maintains that the information is supplied solely to position its product in the commercial marketplace. It does not, according to the protester, show the technical limits of the copier. The publications, however, state that the maximum recommended volumes relate to reliability and the capability of the machines to run efficiently. For instance, Datapro states: "Monthly Volume indicates the number of copies which can be made per month by the machine without causing excessive downtime; it does not necessarily denote the maximum number of copies that can be made by that particular machine." Also, the "North American Copier Guide" states with respect to the "Copies per month" listed, "Machine performance is

satisfactory if users do not exceed these volumes. Use below the minimum may result in excess capital cost, use above the maximum may result in excessive service time."

The publications include disclaimers, as Xerox argues. For instance, the "North American Copier Guide" states: "It is distressing to note many manufacturers are not currently providing prospective buyers with meaningful monthly copy volume information." Nonetheless, GSA points out that since the copiers are to be used on board Navy vessels at sea, extensive service and repair and replacement will not be available on a regular basis. For these reasons, the agency believes that reliability is essential and the recommended monthly volumes listed in the trade publications for the Model 5018--3,000 to 6,000 per month as opposed to the 20,000 required--caused contracting officials to question Xerox' certification. While, given the importance of reliability, it would have been better if the solicitation had required more than a certification, we believe GSA's questioning of Xerox' certification based on the trade publications was reasonable. See Magnavox Advance Prods. and Sys. Co., 69 Comp. Gen. 89 (1989), 89-2 CPD ¶ 458; Univox California, Inc., B-210941, Sept. 30, 1983, 83-2 CPD ¶ 395.4/

We also believe that GSA acted reasonably in ultimately rejecting Xerox' Model 5018 based on concerns about its reliability. Contrary to Xerox' contention, GSA's decision to reject the Xerox copier was not based exclusively on information in the trade publications. Agency officials also considered the RMA data in Xerox' proposal and, after

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4/ Xerox argues that GSA's decision to reject the Xerox proposal is inconsistent with a GSA contracting officer's position in a 1986 agency-level protest and with GSA's decision to accept RMA data to show the reliability of a Xerox copier proposed for another class in this procurement. As Xerox argues, the contracting officer denied the 1986 protest based on his conclusion that monthly volumes in trade publications were submitted by manufacturers for marketing purposes. Nonetheless, differences between the 1986 procurement and this one--for instance, the earlier procurement was for copies, on a cost-per-copy basis, and the copiers were land based, while here the procurement is for the purchase or lease of copy machines which will be based at sea--may explain why GSA viewed reliability differently in the earlier procurement. In any event, we do not believe that GSA should be bound by the decision of a different contracting officer in the 1986 procurement. With respect to the use of RMA data to show reliability under another class in this procurement, the record indicates that GSA rejected Xerox' other model as technically unacceptable for other reasons before considering its reliability.

rejecting the proposal, contracting officials again considered the issue based on the service records on the Model 5018 which Xerox submitted on October 2.

Xerox argues that the RMA data and the service records which it submitted should have caused the agency to question the credibility of the recommended monthly volumes listed in the trade publications and that contracting officials must have misunderstood that information. Xerox points out that the RMA data indicates that for Model 5018 copiers in actual service at a volume of 20,000 copies per month, the average number of copies between failures far exceeds 6,000 and, in fact, exceeds 20,000. Further, Xerox says the service records which it submitted on October 2 support the fact that numerous Model 5018 copiers are actually operating at or over 6,000 copies per month and some are operating at or above 20,000 copies per month. Finally, Xerox argues that in fact very few of the copier model proposed by Savin are used to produce 20,000 copies per month or greater and this indicates that the two firms were not given equal treatment in the evaluation.

Xerox' RMA data and service records show that some Model 5018 copiers have operated reliably at a monthly volume of 20,000 copies per month. We believe that fact was evident to contracting officials even though some agency officials were confused as to the number of machines and the time periods covered by the data. It was also evident from the RMA data and the service records, however, that the number of Model 5018 copiers operating at a volume of 20,000 copies per month was exceedingly small and the vast majority of Model 5018 copiers in actual use produced far fewer than 20,000 copies per month. GSA decided to reject the Model 5018 as a result of the manufacturer recommended volume of 3,000 to 6,000 copies per month listed in the trade publications and the evidence that Model 5018 copiers are rarely used at volumes near 20,000 per month. We think that the record reasonably supports the agency's conclusion.<sup>5/</sup> Also, we do

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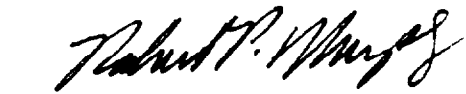
<sup>5/</sup> Xerox argues that the Model 5018 is a derivative of another Xerox copier and, according to Xerox, the reliability and service record of the other machine, from which the Model 5018 was developed, provide evidence of the reliability of the Model 5018. A Xerox representative made this point at the September 19 negotiation session; nevertheless, although it could have done so on October 2, Xerox did not submit evidence of the reliability of the other copier and did not explain why the service record of the other copier should have been taken as evidence of the reliability of the Model 5018. Under the circumstances, and since contracting officials believed the two copiers to be different, we think it would have been unreasonable for GSA to accept Xerox' offer of the Model 5018

(continued...)

not believe that Xerox was treated unfairly compared to Savin; the trade publications list a manufacturer recommended monthly volume of 20,000 for the Savin copier and a higher percentage of Savin's copiers are used to produce 20,000 copies per month or greater.

The data submitted by Xerox does indeed show that at least some of its copiers are operating at the required rate of 20,000 copies per month and, in the absence of any information to the contrary, would seem to support the company's certification. Nevertheless, the agency was faced with information which Xerox itself put out which indicates that the machine offered has a capacity (3,000 to 6,000 copies per month) that is not even close to the required 20,000 per month. It is our view that under these circumstances, the agency has been justifiably skeptical of the data submitted by Xerox and because that data does not clearly show that a significant number of the copiers are, in fact, operating at the required 20,000 copies per month volume, we do not conclude that the agency's judgment to reject the Xerox proposal was unreasonable.<sup>6/</sup> In reaching this conclusion, we have carefully reviewed the record pertaining to the evaluation in the context of all of the protester's arguments. While we have not treated in detail each and every one of the protester's numerous contentions, they have all been considered in reaching our decision.

The protest is denied.

  
for James F. Hinchman  
General Counsel

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5/ (...continued)  
based on assertions relating to the other copier.

6/ Although Xerox argues that the benchmark test of copier speed and information which Xerox was required to submit on the use of consumables, such as dry ink, should have indicated the reliability of the model 5018, neither the benchmark test nor the other information submitted by Xerox provided, or were intended to provide, assurance that an offered copier could meet the requirement that it be capable of reliably producing at least 20,000 copies per month.